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No. 98-524

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

M. MAUREEN POLSBY, M.D.,
Petitioner,

v.

STEVEN G. SPRUILL, ULDIS KLAVINS,
THE HEARST CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioner's principal assertion is that it was not proper for the D.C. Circuit to grant summary affirmance of the district court's summary dismissal of her complaint. The district court dismissed Dr. Polsby's complaint on a motion to dismiss or for summary judgment under Rules 12(b)6 and 56, prior to discovery. Dr. Polsby's claims had been carefully researched and the complaint written by a major law firm, that of Winthrop, Stimson, Putnam and Roberts. Her claims included the right to privacy, the right of publicity, and other complex interrelated tort claims in the rapidly-evolving area of intellectual property law. Dr. Polsby also moved to add copyright infringement claims. The right of publicity claim made this a case of first impression for the D.C. Circuit.

Petitioner only requests that the Court vacate the D.C. Circuit's order granting respondents' motion for summary

affirmance. She is not necessarily asking the Court to consider, at this time, the complex legal questions raised by the complaint itself. Petitioner never had the opportunity to raise her issues at the appeals court level and to file a proper appellate brief in a case in which the published district court opinion contained largely *sua sponte* reasoning. Even a cursory review of the case demonstrates that regardless of what the eventual outcome of the case should be, summary affirmance was not proper. This is a case involving complex legal issues in a highly specialized area of the law. It is not a case in which the merits of the parties positions in district court were so clear as to warrant summary affirmance.

Respondents' Brief In Opposition begins with two "questions presented." These are not questions of law. Both beg the question by raising only the issue of whether the Court should review a case that has already been decided by the lower courts. Respondents' "questions" merely invoke the authority of the lower courts as if it were not the business of this Court to review lower court decisions.

Respondents "questions" reference "undisputed facts" yet material facts were clearly in dispute. The central disputed fact is whether respondents based their novel on Dr. Polsby. It was impermissible for the district judge to act as fact-finder and decide this himself. He was obligated under Rules 12(b)6 and 56 to assume respondents had based their novel on Dr. Polsby. The only question for him to address was whether they were entitled to do so without permission and without compensating her.

As the district court did in its opinion, respondents spend the bulk of their brief arguing whether Dr. Polsby's allegations are true, yet they know full well her allegations must be assumed to be true. Respondents try to personally

discredit Dr. Polsby and also make disingenuous statements in an attempt to mislead the Court. These tactics worked for them in the lower courts. However, respondents would not need such tactics were their legal position secure.

The Court should not be forced to try to see through respondents' dishonest maneuvers. For example, see respondents' assertion that Dr. Polsby's right of publicity action is *not* a case of first impression for the D.C. Circuit. (Opp., p.17). Respondents cite case law to support this assertion and hope the Court will not trouble to check it. The first case they cite, *Brown*, is simply another order for summary affirmance. The second, *Anchorage-Hynning*, has absolutely nothing to do with right of publicity. It is a contracts case involving the statute of frauds in a real estate transaction. These are the only D.C. Circuit decisions cited. In the same paragraph, however, respondents also list *Lane*, *Pearce* and *Barnako* in support of their contention that *Polsby v. Spruill* is not a case of first impression for the D.C. Circuit, yet these cases were never in the D.C. Circuit, as is obvious from the citations. Moreover, two of the three, *Pearce* and *Barnako*, like *Anchorage-Hynning*, are not right of publicity cases at all. Right of publicity is not mentioned anywhere. *Pearce* is a defamation case brought by an employee of E.F. Hutton who alleged he was scapegoated in a report which blamed him for abuses for which the company was prosecuted by the Justice Dept. *Barnako* was a misappropriation of likeness and invasion of privacy case brought because a photography studio had used Barnako's photograph in an advertisement. The photograph had already been exhibited publicly in another context, with permission, however. Moreover, the *Barnako* court stated:

> "In holding that the plaintiff has failed to state a claim for invasion of privacy, the Court does not intend to suggest that the unauthorized use of another's likeness

for promotional purposes is either proper or nonactionable. However, no alternative theory, such as unjust enrichment or conversion, is before the Court.

Respondents repeatedly refer to "settled District of Columbia law." However, besides *Polsby v. Spruill*, there is only one other published right of publicity opinion (state or federal), in the entire jurisdiction, and the facts of that case [*Lane v. Random House, Inc.*, 23 Media L. Rep. (BNA) 1385 (D.D.C. 1995)] are also not analogous to this case.

POLSBY V. SHALALA

Respondents gratuitously quote pejorative statements about Dr. Polsby by Judge Chasanow in her ruling that Dr. Polsby was not sexually propositioned by her NIH supervisor, Dr. Chase. Judge Chasanow unaccountably ruled the way she did despite Dr. Polsby's unimpeached testimony, whereas Dr. Chase's testimony had been repeatedly impeached. Judge Chasanow excluded evidence that Dr. Chase was a known womanizer. A member of the department had walked in on him while his secretary was performing oral sex on him. He had also been reprimanded and placed on administrative leave for having sex in his office with another female subordinate with whom he was having an affair. This could easily be proved. There was an official personnel action, and Dr. Chase's wife divorced him on grounds of adultery because of it. Judge Chasanow did not allow this evidence to be introduced and then said she did not believe Dr. Polsby.

In the instant case, respondents may have biased District Judge Hogan against her by using her NIH case and her other litigation. Judge Hogan is from Maryland, in which NIH is located, although he sits in U.S. District Court for the District of Columbia. The other Maryland judge, Deborah Chasanow,

who ruled in favor of NIH, owes her seat to two powerful Maryland politicians, Senator Barbara Mikulski and Congressman Steny Hoyer, who are respectively on the Senate and House Appropriations Committees, and who are both ardent supporters of NIH.

Citizens are denied access to the justice system because of its cost. If an individual does manage to get to court, politics can be more determinative than the law on the outcome of a case. This is especially true in civil rights cases.

Dr. Polsby's medical career was destroyed because she is a woman and because she refused to have sex with Dr. Chase. When she finally complained about two years of continuous mistreatment and theft of her research by male scientists, she was denied residency credit in what one civil rights attorney called the most vicious example of retaliation she had ever seen. Yet the courts have never seen it that way. In thirteen years, petitioner has not received justice from the bureaucracy or any court except this Court. NIH is protected by Maryland politicians, and, moreover, the U.S. Court of Appeals for the Fourth Circuit is philosophically opposed to the Civil Rights Act and does not enforce it.

THE FOURTH CIRCUIT

Dr. Polsby has just lost her Fourth Circuit appeal. This Court twice reversed the Fourth Circuit on two separate issues in the Fourth Circuit's first opinion in her case against NIH. [In *Polsby v. Shalala*, 507 U.S. 1048 (1993), and *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). (See Pet. 2-3).] Robinson's case was dismissed in district court because of *Polsby v. Chase*, 970 F.2d 1360 (4th Cir. 1992), which held that former employees are not protected against retaliation under Title VII

of the Civil Rights Act. This Court then vacated *Polsby v. Chase* on other grounds.[1]

Robinson won his Fourth Circuit appeal. Dr. Polsby was able to get her retaliation claims reinstated on that basis. Her case was, at that time, back in district court. However, the Fourth Circuit granted Shell Oil's suggestion for rehearing *en banc*. The Fourth Circuit is known to grant the otherwise rarely-granted *en banc* rehearings when plaintiffs in civil rights cases win the panel decision. *Robinson v. Shell Oil*, 70 F.3d 325 (4th Cir. 1995) (*en banc*) reversed its own panel and again held that former employees are not protected against retaliation under Title VII. This was a 7-4 decision authored by Judge Clyde H. Hamilton, who had been on the Robinson panel and had filed a dissenting opinion.

Because of the *en banc* decision, Judge Chasanow dismissed Dr. Polsby's retaliation claims prior to trial and prior to completion of discovery on the retaliation claims. The post-employment retaliation, *i.e.*, denial of residency credit two weeks after she filed an EEO complaint over the theft of her research, was the source of most of Dr. Polsby's damages. The way she was treated at NIH destroyed her research career, but without residency credit, Dr. Polsby could not be employed as a neurologist at all.

This Court unanimously reversed the *en banc Robinson* opinion. No Supreme Court Justice agreed with the majority of the Fourth Circuit that former employees are not protected against retaliation under Title VII, the precedent originally set by the Fourth Circuit in *Polsby v. Chase*.

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[1] *Polsby v. Chase* is the same case as *Polsby v. Shalala*. The Court vacated *Polsby v. Chase* because the government confessed error and admitted that NIH could not show that it had ever posted or otherwise informed employees of the extremely short 30-day limitations period for federal employees to file an informal EEO administrative complaint.

Now, Dr. Polsby, whose Fourth Circuit appeal was pending at the time of this Court's *Robinson* opinion, has just learned that the Fourth Circuit has nonetheless affirmed the dismissal of her retaliation claims. It did so under cover of darkness in a one-page, unpublished, *per curiam* opinion. The Fourth Circuit states that although the grounds on which the district court dismissed Dr. Polsby's post-employment retaliation claims, the *en banc Robinson* opinion, was reversed by the Supreme Court, the Fourth Circuit nonetheless holds the dismissal of the claims: "harmless as our review of the record reveals that the evidence failed to support her claims of post-employment retaliation. Accordingly, we affirm the dismissal of these claims as well."

The reason there was no evidence to support Dr. Polsby's retaliation claims is because the retaliation claims had been dismissed **before trial and before Dr. Polsby had obtained discovery** regarding the retaliation.

There were at least sixteen judges who could have been selected for Dr. Polsby's panel, yet the three judges who made this clearly erroneous yet "cert-proof" decision were all from the seven-judge majority in the *en banc Robinson* opinion, including Hamilton, the author of *Robinson*, and Wilkins, who had been on the original panel in *Polsby v. Chase* and was therefore one of the architects of the "former employees not covered" idea. The Fourth Circuit Chief Judge, Wilkinson, had also been on the original panel in *Polsby v. Chase*.

THE INSTANT CASE

Respondents, including one of the nation's foremost women's magazines, have exploited Dr. Polsby's misfortunes for their commercial benefit. Now they use smear tactics,

mischaracterize the law and Dr. Polsby's allegations, and rely chiefly on denials that they based their novel on Dr. Polsby. Respondents cite the differences between their novel and Dr. Polsby's story and ignore the similarities.

Nowhere in respondents' brief is there any explanation of how "settled" Distinct of Columbia law is so clear that summary affirmance of the dismissal of this case was warranted. Respondents simply focus on whether petitioner's allegations in the complaint are true and hope this Court will make the same mistake the lower courts did. Fact-finding had no place in a decision under Rules 12(b)6 and 56 prior to discovery, and in a case in which petitioner is entitled to a jury. Nonetheless, the district judge admittedly based his decision largely on whether he thought the factual allegations were true, and before any discovery had taken place:

> Because the central issue presented in this motion is the nature and extent of the similarities between the life of the plaintiff and the heroine's life in My Soul To Take and in the Good Housekeeping article, the Court will carefully review and compare the plaintiff's account of her experiences with the story in the book and the article in order to resolve these motions. (Opinion, Pet. App. 4a).

The district judge and the D.C. Circuit were obligated to assume that respondents had based their novel on Dr. Polsby. The only legitimate question was whether they were entitled to do so without permission or compensation.

Instead of a thoughtful legal discussion of the issues raised, or any explanation for the Court of how the parties positions in district court were so clear as to warrant summary affirmance, there is only fancy footwork designed to confuse

the issues. As noted before, when respondents have no cases to support their arguments, they cite cases anyway, beyond ethical bounds, and, in effect, lie to the Court.

Respondents quote the boilerplate language of the D.C. Circuit's order and pretend it proves the case received proper consideration. Respondents do not explain how a case which raises complex issues in a highly technical area of the law deserved summary affirmance, nor do they refute petitioner's description of the way motions for summary affirmance are handled or refute her arguments as to why the procedure is unfair. They *imply* procedures have changed since Judge Mikva's criticisms of them, but do not say how the procedures have changed or how they are now more fair.

Respondents accuse Dr. Polsby of having made a "shameless, unsubstantiated attack on the integrity of the D.C. Circuit." Yet a reading of the referenced portion of her petition shows no such attack. Petitioner does question the integrity of the handling of her case against NIH and has said so in this brief. Petitioner has no such criticisms of the D.C. Circuit. She makes clear that she is, in fact, sympathetic with respect to the court's burgeoning case load. She also knows judges see many meritless appeals from *pro se* litigants. The court's need to get rid of cases is the only reason for the mistake it has made. Nonetheless, the heavy case load does not excuse procedures which deny justice to individuals. Appellate courts should also bend over backwards for *pro se* litigants, instead of the other way around, to ensure they do not lose their rights only because they lack benefit of counsel.

Respondents disingenuously state that petitioner has voluntarily abandoned most of her claims (Opp. at 7), but a reading of the list of issues she would have raised had she been given the opportunity to file a proper appeal brief (Pet. App. 33a-34a) shows that she has not abandoned any claims.

She asks whether authors and publishers may publish a novel based on someone like herself, in which she is still clearly recognizable as her and only her, and include a drawing which looks like her. Does this constitute invasion of privacy? If readers recognize the story as being about Dr. Polsby (which they did), do the fictional aspects of the account constitute false light? Did the unauthorized publication of a fictionalized version of her story deprive Dr. Polsby of the ability to sell her story, and thereby unfairly deprive her of her property? Is an individual such as Dr. Polsby a public figure? How does that bear on other issues in the case? If she is a public figure, would that not increase rather than decrease the commercial value of her identity? Does she not have the right to realize the commercial value of her identity? The answers to these and other questions relevant to this case are not easy. Some were not addressed by the district court, which also completely ignored Dr. Polsby's claim of the unauthorized use of her image.

The fact that the D.C. Circuit granted summary affirmance in such a case as this indicates that perhaps the Court should examine the procedures and practices by which summary affirmance is granted in the D.C. Circuit. The Court, in its role as supervisor of the circuit courts of appeal, should ensure that appellate procedures in each circuit are fair and equitable and comparable to the practices of other circuits.

Respectfully submitted,

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